

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARGARET E. LEFEVER**

Claimant

VS.

**BOEING COMPANY**

Respondent

AND

**INDEMNITY INSURANCE COMPANY  
OF NORTH AMERICA**

Insurance Carrier

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Docket No. 1,024,099

**ORDER**

The parties appealed the July 23, 2008, Award entered by Special Administrative Law Judge John Nodgaard. The Workers Compensation Board heard oral argument on October 17, 2008, in Wichita, Kansas.

**APPEARANCES**

Phillip B. Slape of Wichita, Kansas, appeared for claimant. Eric K. Kuhn of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, at oral argument before the Board the parties stipulated claimant's initial right shoulder injury occurred in 1997. Moreover, in the event this claim is compensable, the parties agree with the Judge's findings that claimant sustained a 19 percent functional impairment and a 61.5 percent work disability.<sup>1</sup> Finally, following oral argument to the Board, respondent clarified and supplemented the record by writing the Board on October 20, 2008, and advising that claimant was paid temporary total disability benefits in this claim from March 23, 2005, through September 10, 2007.

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<sup>1</sup> A permanent partial disability that is greater than the functional impairment rating.

**ISSUES**

Claimant filed this claim in July 2005 alleging she had sustained bilateral shoulder and upper back injuries from the repetitive work activities she performed for respondent "[e]ach and every working day including February 9, 2005."<sup>2</sup> In the July 23, 2008, Award, Judge Nodgaard determined claimant had a 60 percent task loss and a 63 percent wage loss. The Judge also determined respondent was entitled to a credit for paying claimant retirement benefits, which commenced April 1, 2007. Accordingly, the Judge awarded claimant benefits for a 61.5 percent permanent partial disability, less a credit for the retirement benefits.

Respondent contends the Judge erred by awarding claimant any permanent disability benefits in this claim. Respondent argues claimant's bilateral shoulder and neck injuries resulted from compensating for a 1997 right shoulder injury, and, therefore, the injuries that are the subject of this claim are the natural and probable consequence of that earlier injury. Accordingly, respondent argues claimant's present injuries should not be compensated in this claim. In the alternative, respondent argues claimant should receive disability benefits under the schedule of K.S.A. 44-510d for the left shoulder only and that under K.S.A. 44-510f temporary total disability benefits must be deducted when determining the maximum amount of permanent disability benefits claimant can receive for a functional impairment.

Conversely, claimant requests the Board to grant her benefits for a 19 percent functional impairment or affirm the work disability of 61.5 percent, whichever would yield more benefits after applying the retirement credit.<sup>3</sup>

The issues before the Board on this appeal are:

1. Did the work that claimant performed for respondent injure her shoulders and neck or, instead, did those injuries occur merely as the natural and probable result of an earlier right shoulder injury?
2. What is claimant's award of disability benefits?

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<sup>2</sup> Application for Hearing (filed July 14, 2005).

<sup>3</sup> In her brief to the Board claimant argued the work disability should be increased from 61.5 to 67.5 percent. But at oral argument claimant's attorney announced the percentage of work disability was no longer an issue.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant began working for respondent in 1989, making parts as a plastic bench mechanic. In 1997 claimant began experiencing symptoms in her right shoulder for which she sought medical treatment and received rotator cuff surgery. Upon returning to work, claimant had restrictions on using her right shoulder so she performed her work left-handed. In late 2004, claimant began experiencing left shoulder symptoms, which she described as feeling tired and worn out. Over the 2004 Christmas break claimant's left shoulder symptoms improved. But by February 2005 claimant's left shoulder had become very sore. And after a specific incident of throwing some scrap material into a trash dumpster, claimant experienced very sharp pain in her left shoulder and into her neck and she was unable to lift her left arm. Claimant immediately reported the dumpster incident to her supervisor and was sent for medical treatment.

Claimant returned to Dr. Bernard F. Hearon, who had performed the earlier right rotator cuff surgery. Dr. Hearon treated claimant's left shoulder from February 2005 through late June 2007. During that period, the doctor operated on claimant's left shoulder three times – in March 2005, March 2006, and March 2007. Following the first left shoulder surgery, claimant's left arm was strapped down and she could only use her right arm. Consequently, claimant's right shoulder began hurting again. Claimant testified that before her first left shoulder surgery, her right shoulder "felt okay because [she] couldn't do anything with it. . . . [She] did everything left-handed."<sup>4</sup>

After being released by Dr. Hearon, claimant received treatment for her neck from Dr. Pat D. Do. That treatment lasted from mid-July 2007 through late August 2007. According to claimant, her neck pain started around the same time as her left shoulder symptoms.

Claimant's last day of working for respondent was March 15, 2005, before she underwent the first of three left shoulder surgeries. While recuperating from her left shoulder injury, the facilities where claimant worked were taken over by another company. In June 2005 claimant received a letter from that company advising her she would not receive an employment offer. Claimant has not worked for any employer since leaving respondent's employ. According to claimant, she looked for work for approximately two months and then stopped. On April 1, 2007, claimant began receiving retirement benefits from respondent in the sum of \$1,351.12 per month.

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<sup>4</sup> R.H. Trans. at 19.

At her attorney's request, Dr. Michael H. Munhall examined and evaluated claimant for purposes of this claim. Dr. Munhall, who is board-certified in physical medicine and rehabilitation, examined claimant in late October 2005 and in mid-September 2007. The doctor diagnosed cervical spine pain, left shoulder pain and crepitation, and right shoulder pain. Using the *AMA Guides*,<sup>5</sup> the doctor rated claimant as having a 17 percent impairment to the left upper extremity, a two percent impairment to the right upper extremity, and a five percent whole person impairment due to the neck pain. Combining those impairments, the doctor rated claimant as having a 16 percent whole person impairment,<sup>6</sup> which the doctor attributed to the work claimant performed for respondent. The doctor testified, in part:

Q. (Mr. Slape) Did you form an opinion to a reasonable medical certainty on causation?

A. (Dr. Munhall) Yes. In reference to patient history, clinical exam, and based upon the available medical records, I am of the opinion within a reasonable degree of medical probability and based on my education, training, and experience that there is a causal relationship between Margaret Lefever's diagnoses and injury on 2-9-05 during employment at Boeing Aircraft Company, in evolution each and working every day thereafter through 3-16-05, and in evolution during three left shoulder surgeries and postoperative rehabilitation.<sup>7</sup>

When asked whether claimant's left shoulder and neck problems were caused by claimant compensating for her earlier right shoulder injury, the doctor had difficulty quantifying the effect of the earlier right shoulder injury and answered that he did not know. Dr. Munhall, however, indicated the previous right shoulder injury was certainly a factor.

Q. (Mr. Kuhn) Okay. Well, would you agree with me that at least based on the history that Ms. Lefever has given both to the Court and to you in your report, that she specifically relates the left shoulder and neck problems to the compensatory overuse phenomenon that we've talked about?

MR. SLAPE: Objection, argumentative.

MR. KUHN: You can answer.

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<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>6</sup> Munhall Depo. at 14.

<sup>7</sup> *Id.* at 15.

A. (Dr. Munhall) Yes, that's a distinct possibility, and you must be leading me somewhere for a reason, and not to avoid your conclusion, but truly I don't know, I didn't take care of her, and I can't really tell you what the primary reason -- most injuries I see usually have more than one factor of causation. Now, if you are asking me what the primary factor of causation was, I couldn't tell you, but I will say this, that the previous right shoulder injury is certainly one of the different factors that eventually led to her shoulder -- left shoulder presentation.

. . . .

. . . I think there is a whole list of factors that led to her left shoulder injury, and I couldn't tell you and weigh one over the other. Amongst those different factors would be the previous right shoulder injury, but I just can't weigh one versus the other, I don't have enough information and it -- I wasn't there at the time.<sup>8</sup>

Moreover, Dr. Munhall thought claimant's left shoulder injury was a significant factor in the symptoms claimant subsequently developed in her right shoulder.

Q. (Mr. Kuhn) Do you think [the right shoulder problems are] a natural and probable consequence of compensatory overuse of the right shoulder again due to the left shoulder problems?

A. (Dr. Munhall) That is a significant factor, yes. She specifically told me that while her left arm was in a postoperative sling, she depended upon the right side primarily and, thereafter, she aggravated the right shoulder.<sup>9</sup>

When the question regarding the relationship of claimant's earlier right shoulder injury and her present left shoulder and neck problems was posed somewhat differently, Dr. Munhall indicated *both the earlier right shoulder injury and claimant's work activities were distinct and important components that resulted in the left shoulder injury*, which he would apportion 50-50 if he were the judge.<sup>10</sup>

Also at her attorney's request, Dr. George G. Fluter examined claimant in late January 2008. Dr. Fluter is board-certified as an independent medical examiner and board-certified in physical medicine and rehabilitation as well as internal medicine. The doctor concluded that as a result of the work claimant performed for respondent claimant had internal derangement in her left shoulder, right shoulder pain with impingement, neck

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<sup>8</sup> *Id.* at 23, 24.

<sup>9</sup> *Id.* at 24, 25.

<sup>10</sup> *Id.* at 38.

and upper back pain from cervicothoracic strain/sprain, and myofascial pain affecting the neck and upper back.

Using the *AMA Guides*, Dr. Flutter rated claimant as having a 24 percent impairment to the left upper extremity, a nine percent impairment to the right upper extremity, and a five percent whole person impairment to the cervical spine. Those ratings comprised a 22 percent whole person impairment.

Assuming claimant continued to use her left arm significantly more than the right arm following her earlier right shoulder surgery, Dr. Flutter testified that evidence would be strong support of compensatory overuse as being the cause of claimant's left shoulder problems.<sup>11</sup>

Respondent presented the testimony of Dr. Pat D. Do, who is board-certified both in orthopedic surgery and as an independent medical examiner. He first saw claimant at her attorney's request and, as indicated above, later treated her for her neck symptoms from mid-July through late August 2007. Using the *AMA Guides*, the doctor rated claimant's neck as comprising a five percent whole person impairment.

In short, Dr. Do testified that claimant's testimony supported his initial opinion that her left shoulder, neck and resulting right shoulder problems were the natural and probable consequence of her earlier right shoulder injury. But the doctor also admitted he did not know anything specific about the work claimant performed for respondent and *that he was unable to apportion the cause of claimant's left shoulder problems between her work and the initial right shoulder injury*.<sup>12</sup>

The Board finds the evidence establishes that claimant initially injured her right shoulder in 1997 and afterwards protected that shoulder by using her left upper extremity. Likewise, the Board finds that when claimant returned to work for respondent she then injured her left shoulder and neck as a direct result of the repetitive trauma she sustained from her work activities. In addition, the Board finds claimant's preexisting right shoulder injury contributed to the left shoulder injury as claimant was trying to protect the right shoulder by performing her work with her left upper extremity. In that respect, claimant's left shoulder injury can be attributed to both her work and the earlier right shoulder injury.

Furthermore, the Board finds claimant developed additional right shoulder problems and neck symptoms as a direct result of protecting her left shoulder following the initial and

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<sup>11</sup> Flutter Depo. at 21.

<sup>12</sup> Do Depo. at 15, 17.

subsequent left shoulder surgeries. Accordingly, the Board finds claimant's present right shoulder symptoms are the natural consequence of her left shoulder injury.

**1. When an earlier injury contributes to the development of a later injury, is that an affirmative defense that relieves the employer of all liability for that later injury?**

The principal issue in this claim is whether claimant is entitled to receive disability benefits for injuries to her shoulders and neck or whether those benefits should be denied on the basis that claimant's injuries are partly the natural consequence of the earlier right shoulder injury. There is no dispute that claimant injured her left shoulder as a result of the work she performed for respondent, to wit:

Q. (Mr. Kuhn) She specifically tells you that she primarily used her left arm during the workplace because of compensatory overuse from the right shoulder injury and she's telling you that that's how she developed the left shoulder problem, correct?

A. (Dr. Munhall) I'd have to interpret what she was trying to tell me.

Q. Well, it's right there in your report, Doctor, take all the time you need to look at that, if you would, please.

A. I think what she was telling me was she hurt her right shoulder, she still had restrictions when she went back to work, there were a lot of things she avoided with her right arm, so she was doing a number of things specifically with the left arm in distinction to the right. It doesn't negate the fact that there were specific things in her workplace that then triggered the left shoulder.

**Q. Right, and I'm not disputing that she developed the left shoulder problem as a result of working out at Boeing, there is no dispute on that.**

A. Right.<sup>13</sup>

Respondent argues that claimant is not entitled to receive disability benefits in this claim because the earlier right shoulder injury contributed to her developing her later bilateral shoulder and neck injuries. In essence, respondent contends these facts comprise an affirmative defense. As confirmed at oral argument, under respondent's theory any worker who had previously lost an arm in an accident would not be entitled to receive benefits for a later work injury to the other arm as the earlier injury contributed to the new injury. The Board disagrees.

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<sup>13</sup> Munhall Depo. at 36 (emphasis added).

The primary purpose of the Workers Compensation Act is to burden industry with the economic loss to a worker from injuries sustained in the course of employment.<sup>14</sup> And it has long been a basic tenet that, absent a statute to the contrary, a disability should not be apportioned between a preexisting condition and a later accident that caused the resulting disability. That principle was eloquently stated by the Kansas Supreme Court in *Poehlman*:<sup>15</sup>

In the absence of a statute to the contrary, if a workman's disability is precipitated by an accident arising out of and in the course of his employment, which disability in all probability would not have arisen but for such accident, regardless of pre-existing conditions the entire disability, both as to extent and duration, is within the injury for which the workmen's compensation act authorizes compensation.

Another major tenet is that a worker is not to be denied compensation merely because of a preexisting physical condition. The Kansas Supreme Court in *Strasser*<sup>16</sup> held:

The act prescribes no standard of health for workmen, and where a workman is not in sound health but is accepted for employment, and a subsequent industrial accident suffered by him aggravates his condition resulting in disability, he is not to be denied compensation merely because of a pre-existing physical condition. In other words, it is well settled that an accidental injury is compensable where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction. (Citations omitted.)

Although the present claim is not premised upon aggravating a preexisting left shoulder condition, the principles above are noteworthy.

The natural and probable consequence rule evolved to expand, not limit, the ability of injured workers to receive just and appropriate compensation for their injuries. In explaining the difference between the natural and probable consequence rule and the last injurious exposure rule, the Kansas Court of Appeals in *Lietzke*<sup>17</sup> explained:

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<sup>14</sup> *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

<sup>15</sup> *Poehlman v. Leydig*, 194 Kan. 649, Syl. ¶ 4, 400 P.2d 724 (1965).

<sup>16</sup> *Strasser v. Jones*, 186 Kan. 507, 511-512, 350 P.2d 779 (1960). Also see *Claphan v. Great Bend Manor*, 5 Kan. App. 2d 47, 611 P.2d 180, rev. denied 228 Kan. 806 (1980).

<sup>17</sup> *Lietzke v. Tru-Circle Aerospace*, No. 98,463, 2008 WL 2369908 (Kansas Court of Appeals unpublished opinion filed June 6, 2008).

The theory behind the natural and probable consequence rule is to ensure that an injured worker receives compensation for future aggravations of the same injury. The rule is not so much concerned with who is responsible to pay benefits as it is to make sure that the injured worker receives compensation. The last injurious exposure rule, on the other hand, provides a different perspective. . . .

There is no statute or appellate opinion of which the Board is aware where the natural and probable consequence rule has been used, in essence, as an affirmative defense. Conversely, the Workers Compensation Act treats the contribution between an earlier and later injury in an entirely different manner. In K.S.A. 44-510a, the Act specifically addresses how new injuries are to be compensated when an earlier injury or disability contributes to the new injury or disability, as happened in this claim. That statute provides, in pertinent part:

(a) ***If an employee*** has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and ***suffers a later injury, compensation payable*** for any permanent total or partial disability for such later injury ***shall be reduced***, as provided in subsection (b) of this section, ***by the percentage of contribution that the prior disability contributes to the overall disability following the later injury***. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment. (Emphasis added.)

Accordingly, in K.S.A. 44-510a the legislature addressed the legal effect of earlier injuries upon new injuries. That statute specifically addresses how temporary total disability benefits, permanent disability benefits, and medical benefits are affected. Nevertheless, if employers do not provide the necessary evidence to satisfy K.S.A. 44-510a, the benefits payable for a new injury may not be reduced, except in those situations where there may be a reduction for preexisting functional impairment under K.S.A. 44-501(c).

In summary, claimant has established she injured her left shoulder and neck in an accident that arose out of and in the course of the work she performed for respondent. In

addition, claimant is entitled to receive benefits for her right shoulder for the aggravation she sustained as a natural consequence of her left shoulder injury.

**2. What is claimant's award of disability benefits?**

As indicated above, the parties did not dispute that claimant sustained a 19 percent whole person functional impairment and a 61.5 percent work disability should this claim be found compensable.

Respondent has failed to establish that a reduction of claimant's permanent disability benefits is appropriate under either K.S.A. 44-510a or 44-501(c). On the other hand, respondent has established that claimant's disability benefits are subject to being reduced under K.S.A. 44-501(h) due to her receipt of retirement benefits provided by respondent. K.S.A. 44-501(h) provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

The evidence is uncontradicted that claimant now receives a monthly retirement benefit that was fully funded by respondent. Claimant's retirement benefits commenced April 1, 2007. Claimant's gross pension benefit is \$1,351.12<sup>18</sup> per month through May 31, 2014, when it decreases to \$651.12 per month for the remainder of her life.

The Board has computed the temporary total and permanent partial disability benefits due claimant for a 19 percent permanent partial disability as well as for a 61.5 percent work disability. When applying the reduction for the retirement benefits, the calculations indicate claimant is entitled to receive the most in temporary total and permanent disability benefits based upon her functional impairment rating. Using that rating, claimant is entitled to receive 128.86 weeks of temporary total disability benefits, or

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<sup>18</sup> The net monthly benefit is \$1,205.22.

\$57,858.14,<sup>19</sup> and 57.22 weeks of permanent partial disability benefits, or \$25,691.78,<sup>20</sup> for a total award of \$83,549.92.<sup>21</sup>

In conclusion, claimant is entitled to receive permanent disability benefits under K.S.A. 44-510e for a 19 percent whole person functional impairment.

**AWARD**

**WHEREFORE**, the Board modifies the July 23, 2008, Award entered by Judge Nodgaard.

Margaret E. Lefever is granted compensation from Boeing Company and its insurance carrier for a February 9, 2005, accident and resulting disability. Based upon an average weekly wage of \$1,266.40, Ms. Lefever is entitled to receive 128.86 weeks of temporary total disability benefits at \$449 per week, or \$57,858.14, plus 57.22 weeks of permanent partial disability benefits at \$449 per week, or \$25,691.78, for a 19 percent permanent partial disability, making a total award of \$83,549.92, which is all due and owing less any amounts previously paid.

Claimant's attorney should seek approval by the Administrative Law Judge of the attorney fee contract between claimant and said attorney, which was filed with the Division of Workers Compensation after the Award was entered. The provision in the Award approving claimant's attorney fees is set aside.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

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<sup>19</sup> This is below the \$100,000 maximum set forth in K.S.A. 44-510f(a)(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability benefits paid or due.

<sup>20</sup> This is below the \$50,000 maximum set forth in K.S.A. 44-510f(a)(4) where functional impairment only is awarded.

<sup>21</sup> This is below the \$100,000 maximum set forth in K.S.A. 44-510f(a)(3) for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability benefits paid or due.

Dated this \_\_\_\_ day of December, 2008.

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BOARD MEMBER

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**DISSENT**

The majority awards claimant a 19 percent permanent partial disability to the body as a whole for her injuries. The Kansas Supreme Court in *Casco*<sup>22</sup> emphasized that scheduled injuries are the general rule and nonscheduled injuries are the exception. Accordingly, if an injured body part is on the schedule in K.S.A. 44-510d, then the compensation for that injury must be calculated pursuant to that schedule. The claimant's arms (shoulders) are on the schedule.<sup>23</sup> Therefore, any portion of the permanent partial disability awarded by the majority that corresponds to the permanent impairment ratings for the arms (shoulders) must be calculated pursuant to K.S.A. 44-510d(a)(13). The neck is not contained within the schedules of K.S.A. 44-510d. An injury to the neck is an unscheduled injury. Accordingly, the portion of the 19 percent permanent partial disability award that corresponds to the neck injury should be calculated pursuant to K.S.A. 44-510e.

Nowhere does K.S.A. 44-510d say that scheduled injuries that occur simultaneously with nonscheduled injuries should be compensated as general body disabilities under K.S.A. 44-510e. By combining the impairment ratings for claimant's scheduled injuries to her shoulders with the rating for her unscheduled injury to her neck, the majority is reading something into K.S.A. 44-510d that is not in the statute. *Casco* requires that combinations of scheduled injuries be compensated separately regardless of whether the injuries

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<sup>22</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶¶ 7, 10, 154 P.3d 494, rev. denied \_\_\_\_ Kan. \_\_\_\_ (2007).

<sup>23</sup> K.S.A. 44-510d(a)(13).

occurred separately, simultaneously, or as a result of a natural progression. Likewise, K.S.A. 44-510d and K.S.A. 44-510e should be applied separately, such that combinations of scheduled and nonscheduled injuries should be compensated separately.

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BOARD MEMBER

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BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant  
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge  
John Nodgaard, Special Administrative Law Judge